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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1141

MIGUEL ANGEL MORA,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA DISTRICT COURT OF APPEAL, FIRST DISTRICT

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The Petitioner MIGUEL ANGEL MORA respectfully prays that a writ of certiorari issue to review the judgment of the Florida District Court of Appeal, First District, entered in this proceeding on February 23, 1979.

OPINION BELOW

The two-sentence opinion of the Florida District Court of Appeal, a summary affirmance, is not reported.

The result, an affirmance of the trial court, is reported as *Mora v. State,* 368 So.2d 1377 (Fla. 1st DCA 1979) ("Florida Decisions Without Published Opinions"). The opinion is reproduced in the Appendix, at page 1a. The opinion of the trial court (the Circuit Court of the Second Judicial Circuit for Leon County, Florida) was not published, and it, too, appears in the Appendix, at page 6a.

JURISDICTION

The judgment of the Florida District Court of Appeal, First District, was entered on February 23, 1979, and a timely petition for rehearing was denied on March 21, 1979. Thereafter, on October 25, 1979, the Supreme Court of Florida, acting on a timely petition, declined to exercise its authority to review by certiorari the decision below. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

Whether the search of the Petitioner's suitcase at the Tallahassee Municipal Airport on January 29, 1978, was in violation of the Petitioner's protection against unreasonable searches and seizures as guaranteed by the fourth and fourteenth amendments to the United States Constitution, thus requiring the suppression of the use, in subsequent criminal prosecution of the Petitioner, of evidence gained as a result of that search.[1]

[1] Throughout this proceeding, the parties have principally addressed one, seemingly controlling, subsidiary question: Was there police involvement in the warrantless search that led to the Petitioner's arrest and prosecution, so as to render that search governmental and thus within the scope of protection afforded by the fourth and fourteenth amendments to the United States Constitution? The sole argument of the state in the court below was that the search was not "governmental."

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States provides, in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE[2]

On a Sunday morning in January, 1978, Petitioner MIGUEL ANGEL MORA arrived at the Tallahassee [Florida] Municipal Airport on an Eastern Airline flight that had

[2] Because the lower court did not enter an opinion setting forth the facts, the Petitioner has reconstructed the relevant factual situation with some depth. Throughout these appellate proceedings, the Respondent State of Florida has accepted the Petitioner's statement of the case and facts. *See* Respondent's Jurisdictional Brief at 2, *Mora v. Florida,* No. 56,645 (Fla. Oct. 25, 1979); Brief

[footnote continued]

originated in Miami, Florida, where he had "checked" his suitcase with the airline. Amid the clothing in his suitcase were two plastic sandwich-bags, one containing some capsules of methaqualone and phenobarbitone and the other a few grams of marijuana (R. 8, Lines 14-16), his possession of which was unlawful under Florida law. (R. 1).

After disembarking, the Petitioner learned that his suitcase had failed to accompany him. He reported the loss and described his zippered, brown leather suitcase to Eastern Airline employees, who then put out a "tracer" notice in an attempt to find the lost suitcase. The Petitioner went to his home in Tallahassee and waited.

Later that day, he telephoned the Eastern desk, seeking information on the location of his luggage. (R. 38, Lines 3-4). Late in the afternoon, the suitcase arrived at the airport. According to Eastern employees, the baggage-check identification number had been removed. (R. 37, 56). Having obtained from the Petitioner a description of his clothing in the suitcase, the Eastern employees determined to open it, ostensibly to make certain that it belonged to him. (R. 51).[3]

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of Appellee at 2, *Mora v. Florida*, No. KK-409 (Fla. 1st DCA Feb. 23, 1979). It is recognized that this Court will "make its own independent examination of the record" in deciding whether the decision of the lower court deprives the Petitioner of his rights as secured by the Constitution. *Napue v. Illinois*, 360 U.S. 264, 271-72 (1959).

[3]Another and quite different reason for this—the initial opening of the suitcase—is reflected in statements made by the Eastern employees to Tallahassee police officers. Officer Gurney Smith spoke with Eastern employee Doug Adams shortly after the suitcase was first opened: "My understanding of the reasoning I think was when he came around to advise me in this matter, that this—Mr. Mora, I believe—had been more or less harrassing them all during that day of calling them in regards to has his bag come

[footnote continued]

It was Eastern Airline employee Doug Adams who initially opened the suitcase. (R. 35). While searching the Petitioner's bag, Adams found the two plastic sandwich-bags underneath some clothing inside the suitcase. (R. 39, Lines 7-8; R. 69, Line 1). Adams closed the suitcase and left it to obtain the assistance of the Tallahassee police officer who was on duty at the airport, Officer Gurney Smith.

Doug Adams told Officer Smith that he "thought" that he had discovered a suitcase "that contained some type of drugs . . . ." (R. 22, Lines 17-19). Officer Smith thereupon asked Adams to show him the contents of the suitcase. (R. 42; R. 28, Lines 22-24). Officer Smith was taken to the Eastern Airline office, where "the suitcase was laying on the table." (R. 22, Line 23). Pursuant to Officer Smith's request (R. 28, Lines 22-24; R. 42, Lines 1-2), Mr. Adams "laid the top back" (R. 22, Lines 23-24) and then moved aside some sweaters—which the Petitioner had previously described as being in his suitcase—to show the police officer the two sandwich bags: "After he moved the sweaters is when I saw the stuff." (R. 28, Lines 10-11).

But Officer Smith could not identify the contents of either of the plastic bags. (R. 39, Lines 15-19; R. 36, Lines 2-9). He needed to call a "vice squad officer" to determine whether they contained contraband. (R. 42, Lines 7-11).

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in. And they just more or less became kind of suspicious of why he was so concerned about the bag." (R. 26, Lines 13-18). Officer Richard Huffman arrived on the scene some time later, and he was apparently told the same thing: "Mr. Mora had further contacted them several more times. He seemed to be upset; . . . . He just wanted to get the bag as soon as possible, and he'd like to know what the problem was. Because this happened several different times and because Mr. Mora was very short with them over the phone . . . they began to wonder a little bit about that bag." (R. 80, Lines 12-20).

But—even before Officer Smith was called—Eastern Airline employees had long-since established that the Petitioner was the owner of the suitcase: The sweaters that he had described were indeed in the suitcase, covering the suspicious "baggies." Eastern's business was finished, so they carefully repacked the suitcase, just as it was before they had ever opened it. (R. 40, Lines 6-8; R. 54, Lines 14-17). While Officer Smith watched, Doug Adams zipped the suitcase closed (R. 27, Lines 12-14) and moved it to another room. (R. 16, Lines 12-14).

So Officer Smith called the Tallahassee Police Department to turn the matter over to an experienced "vice officer." (R. 25, Lines 19-25; R. 30, Lines 20-23). But the one vice officer who was on duty could not be reached. (R. 23, Lines 4-9). Instead, it was Patrolman Richard Huffman of the Tallahassee Police Department who was dispatched to the airport. (R. 79, Line 13).

When Officer Huffman arrived, Officer Smith met him and told him that "Eastern Airlines officials had a suitcase that they suspected of having illegal drugs in it." (R. 88, Lines 1-3). Upon learning that his call involved suspected "illegal drugs," Officer Huffman, too, "called the vice section of the police department" and "found out that there wasn't anybody else on call in vice that could come out and handle it." (R. 79, Lines 23-25). So, Officer Huffman went to the Eastern Airline office. The Petitioner's suitcase was there, still closed. (R. 88, Lines 4-8; R. 30, Lines 3-6).

At this point, the Petitioner remained unaware that his suitcase had arrived. He was not at the airport. (R. 43, Lines 22-24). And although the airline employees could have held the suitcase for "an hour or two" while a warrant was obtained (R. 43, Lines 17-19), they were

not asked to do so. (R. 43, Lines 10-13). At no point was there an attempt to obtain a search warrant. (R. 43, Lines 10-13). Instead, Officer Huffman asked Eastern's Doug Adams to open the Petitioner's suitcase and to show him the suspicious items. (R. 85, Lines 16-18; R. 29, Lines 13-17; R. 14, Lines 16-23). In response, Adams unzipped (R. 88, Lines 7-9) and opened the bag "for him." (R. 14, Lines 16-17). "He asked to look at the contents of the bag, and I just opened the bag and he made his examination." (R. 40, Lines 2-3).

The plastic bags were still "in the back of the bag underneath the coat." (R. 39, Lines 7-8). Eastern's Doug Adams testified as follows:

Q. So then Officer Huffman lifted up the coat and saw the drugs there?

A. Right.

Q. Okay.

A. Well, he just moved it aside. [R. 40, Lines 10-14].

Officer Huffman testified that "underneath some of the clothing" he found "a small plastic bag, clear bag, containing a small amount of brown, grassy substance" which he "tentatively considered" to be marijuana. (R. 81, Lines 10-13). Nearby, he found a plastic bag containing what he described as "40 to 50 pills that were blue and green ones and four or five yellow pills." (R. 81, Lines 14-16). Officer Huffman once again called the vice section of the Tallahassee Police Department in hopes that someone familiar with narcotics would come out to the airport and identify the substances. But this was to no avail. (R. 86).

At this point, Officer Huffman decided to arrest the Petitioner: "We . . . decided that we would go ahead and call Mr. Mora up . . . and he could come and pick it up."

(R. 81, Lines 17-20). An Eastern employee notified the Petitioner that his suitcase had arrived. (R. 60, Lines 15-18). When the Petitioner arrived at the airport, he identified the suitcase as his and was placed under arrest by Officer Huffman for "a possible drug violation." (R. 82, Lines 3-15).

A FEDERAL QUESTION WAS AND IS PRESENTED

As a result of the airport searches, the Petitioner was charged by the Respondent State of Florida with the commission of three counts of possession of controlled substances, two felonies and one misdemeanor. (R. 1-2). He initially plead not guilty to the charges (R. 3-4), and pursuant to Rule 3.190(h), Florida Rules of Criminal Procedure, he filed a timely Motion to Suppress the evidence obtained as a result of the search. In that Motion, the Petitioner specifically invoked his "rights as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution." (R. 74). On May 22, 1978, the trial court conducted a hearing on that Motion to Suppress, where the Petitioner and the State stipulated that the Petitioner's Motion would be determined solely upon depositions which had previously been taken. (R. 115, 117, 118). The trial court heard no testimony nor considered any evidence—other than those depositions—in connection with the Motion.

Several days later, the trial judge orally announced a decision to deny the Motion to Suppress Evidence, although the written Order to that effect was not rendered until June 2, 1978. (R. 95). As a result of the denial of that Motion, the Petitioner entered his negotiated plea of nolo contendere to one of the three counts against him, expressly and specifically reserving his right, pursuant to Rule 3.172(c)(iv), Florida Rules of Criminal Procedure, to appeal the trial court's ruling

denying the Motion to Suppress Evidence. (R. 106). The sentence imposed (R. 101) has been stayed by the trial court pending the outcome of these proceedings.

Subsequent to the imposition of sentence, the Petitioner filed a notice of appeal, timely invoking the jurisdiction of the lower court, the Florida District Court of Appeal, First District. (R. 99). The Petitioner appealed the trial court's refusal to suppress the evidence, again contending that it had been obtained as a result of an unreasonable search and seizure in contravention of the fourth and fourteenth amendments to the United States Constitution. The depositions upon which the trial court ruling was based form the bulk of the record below. (R. 11-73, 76-92).

The lower court, on February 23, 1979, affirmed the action of the trial court, and on March 21, 1979, denied a timely Petition for Rehearing. Appendix, page 3a. The Petitioner then timely sought review in the Supreme Court of Florida, but on October 25, 1979, that court, also without opinion, declined to exercise its discretionary jurisdiction to make such a review. Appendix, page 4a. This Petition was filed within ninety days of that denial.

REASONS FOR GRANTING THE WRIT

No opinion was issued below, but the facts upon which the Motion to Suppress was denied are available in the record and are not disputed. The necessary and dispositive subsidiary question is whether or not there was sufficient police involvement in the search of the Petitioner's suitcase so as to render that search subject to the restrictions of the fourth amendment to the United States Constitution, as made applicable to the

states by the fourteenth amendment.[4] Because there are no exceptions to the fourth-amendment warrant requirement even arguably available to render the search constitutionally "reasonable,"[5] the lower court, like the trial court, must have adopted the Respondent's sole position through these proceedings: "the Fourth Amendment is not applicable in the case sub judice." Brief of Appellee at 2, *Mora v. Florida*, No. KK-409 (Fla. 1st DCA Feb. 23, 1979). The lower court found that the fourth amendment was not implicated in Officer Huffman's[6] search of the suitcase and that, therefore, there was no search warrant required.

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[4]The fourth amendment has been made fully applicable to the states by the fourteenth amendment. *See Mapp v. Ohio*, 367 U.S. 643 (1961); *Wolf v. Colorado*, 338 U.S. 25 (1949). In this Petition, reference is made to the fourth amendment as it applies to the State of Florida.

[5]A warrantless search, if subject to the fourth amendment, is "*per se* unreasonable." *Katz v. United States*, 389 U.S. 347, 357 (1967). The exceptions to the warrant requirement are "jealously and carefully drawn," *Jones v. United States*, 357 U.S. 493, 499 (1958), so as to require two things: (1) probable cause, and (2) exigent circumstances. *E.g., Vale v. Louisiana*, 399 U.S. 30 (1970). In this case, there was neither: Officer Huffman did not have probable cause when he asked that the suitcase be opened. All he knew was that unidentified Eastern employees "had a suitcase that they suspected of having illegal drugs in it." (R. 88, Lines 1-3).

Moreover, it cannot realistically be asserted that "the exigencies of the situation made that course imperative." *McDonald v. United States*, 335 U.S. 451, 456 (1948). The record establishes the contrary: The suitcase *could* have been held for the police officers while a search warrant was obtained. The Petitioner was *not* at the airport to claim the suitcase; he was not even aware that his suitcase had arrived, until Officer Huffman "agreed" that he should be so informed. (R. 43; R. 81, Lines 17-22).

[6]It is clear from the record that the Petitioner was arrested and charged, and that the evidence was seized, as a result of what Officer Huffman saw in his (the third) search of the Petitioner's suitcase. (R. 81, Lines 10-13). Officer Smith, the first officer to view the contraband, did not know what it was. And all that

[footnote continued]

I.

THE DECISION BELOW IS NOT IN ACCORD WITH THE DECISIONS OF THIS COURT AS TO THE DEGREE OF GOVERNMENTAL PARTICIPATION SUFFICIENT TO RENDER A SEARCH SUBJECT TO CONSTITUTIONAL RESTRAINT.

This case involves more than one search.[7] From the outset the Petitioner has conceded (R. 127) that the first search, "the original opening," (R. 95) was outside the scope of protection afforded by the fourth amendment and thus by the exclusionary rule. As the trial court correctly found:

> The *original* opening . . . .
>
> . . . was done by private citizens not acting as agents of the police. [Appendix, page 6a (emphasis added)].

But in deciding that the subsequent openings—done at police request and for police purposes—were beyond the protection of the fourth amendment,[8] the lower court

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Smith told the arresting Officer Huffman *before* Huffman's search was that "Eastern Airlines officials had a suitcase that they suspected of having illegal drugs in it." (R. 87-88). Regardless, Officer Smith's view was unlawfully obtained for the same reasons as was Officer Huffman's subsequent examination. The suitcase was opened and clothing moved aside for Officer Smith's benefit and at his request, after the airline employees had identified its owner. (R. 22, Lines 17-19; R. 23-24; R. 28, Lines 22-24; R. 29, Lines 10-12; R. 42).

[7]This fact is recognized in the trial court's order, where the first three of that court's four findings were directed to the "original opening of the Defendant's suitcase." *See* Appendix, page 6a.

[8]*See Arkansas v. Sanders*, 99 S.Ct. 2586, 2592 (1979) (citations omitted):

> A lawful search of luggage generally may be performed only pursuant to a warrant. [L]uggage is a common repository for one's personal effects, and therefore is inevitably associated with the expectation of privacy.

deviated from principles of federal constitutional law most clearly and specifically enunciated by this Court in *Lustig v. United States,* 338 U.S. 74 (1949).

It was in *Burdeau v. McDowell,* 256 U.S. 465 (1921), however, that this Court set forth the most general proposition that "The Fourth Amendment . . . applies to *governmental* action." 256 U.S. at 475 (emphasis added). In *Burdeau,* papers were stolen and turned over to federal prosecutors. The Court concluded that "there was no invasion of the security afforded by the Fourth Amendment against unreasonable search and seizure," because

> . . . no official of the federal government had anything to do with the wrongful seizure of the petitioner's property, or any knowledge thereof until several months after the property had been taken from him . . . .

Id. at 475. But there was no attempt in *Burdeau* to state, in general terms, the extent to which police involvement in a search will be tolerated before the search becomes subject to constitutional restraints.

It was not until the decision of this Court in *Lustig* that these general principles were set forth. After thirty years, *Lustig* continues to be recognized as "the leading case in this area" of the law of search and seizure. *United States v. Mekjian,* 505 F.2d 1320, 1327 (5th Cir. 1975).

The principles enunciated in *Lustig* apply to this and similar cases by analogy: *Lustig* involved the old "silver platter" doctrine, which allowed the use in federal court of evidence improperly seized by any person who was not a *federal* officer. The *Lustig* decision defines the extent to which federal officers can become involved in a search, without that search becoming—for fourth-amendment purposes—a federal search. In this connection, the

United States Court of Appeals, Fifth Circuit, has observed:

> Although the "silver platter" doctrine allowing fruits of illegal state searches to be freely received in the federal courts has now been abrogated, that former rule has its analogue in the law governing searches conducted by private individuals.

Id. at 1327-28 (citations omitted).

The general principles enunciated in *Lustig* were flatly contradicted by the action of the lower court.[9] The facts of *Lustig* make that contradiction most glaring: Local police officers in that case (analogous to private persons) conducted a warrantless search of Lustig's hotel room, with the permission of the hotel manager. They had their own, non-federal reasons for the search—they were seeking evidence of violations of state law. During their search, however, the state officers found evidence indicating possible counterfeiting of currency, a federal crime. They called federal agent Greene.

The Court found that "Greene did not request the search, that . . . he was not the moving force of the search, and that the search was not undertaken by the police to help enforcement of a federal law." 338 U.S. at 78. The "state officers preceded Greene in illegally rummaging through the bags and bureau drawers . . . ."

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[9]The deviation of the lower court and of some other appellate courts from the principles enunciated in *Lustig* can perhaps be partially explained by the fact that this Court has not, since that 1949 decision, reasserted and applied those principles to a case such as the one at bar. *Cf. Coolidge v. New Hampshire,* 403 U.S. 443, 487 (1971) (the fourth amendment applies if the private party, "in light of all the circumstances of the case, must be regarded as having acted as an 'instrument' or agent of the state . . . .") (plurality opinion) (citations omitted).

Id. at 79. Greene did not play a role, the Court observed, in the physical process of the search, but he did in the "functional" process:

> He was an expert in counterfeiting matters and had a vital share in sifting the evidence . . . . He exercised an expert's discretion in selecting or rejecting evidence that bore on counterfeiting.

Id. On these facts, the Court concluded that Greene participated to an extent sufficient to call into play the fourth amendment:

> But search is a functional, not merely a physical, process. Search is not completed until effective appropriation, as part of an uninterrupted transaction, is made of illicitly obtained objects for subsequent proof of an offense. Greene's selection of the evidence deemed important for use in a federal prosecution for counterfeiting, as part of the entire transaction in Room 402, was not severable, and therefore was part of the search carried on in that room. [A]lthough he himself did not help to empty the physical containers of the seized articles he did share in the critical examination of the uncovered articles as the physical search proceeded.

Id. at 78. So, too, in this case, airline officials first entered the suitcase for purposes other than assisting Officer Huffman in garnering evidence. Completing their search, and after reclosing the suitcase, the airline employees informed the police of the presence of suspicious materials in the Petitioner's suitcase. Yet, unlike agent Greene in *Lustig*, the officers in the instant case went so far as to *request* another invasion of Petitioner's suitcase. Like agent Greene, the police officers were the "experts": like him, they conducted "the critical examination of the uncovered articles." *Id.* The search was

not completed until the officers became involved and made the determination that there was evidence present for use in a state prosecution.

The *Lustig* decision set forth this basic principle:

> The decisive factor . . . [making a search governmental] is the actuality of a share by a federal officer in the total enterprise of securing and selecting evidence. . . . It is immaterial whether a federal agent originated the idea or joined in it while the search was in progress. So long as he was in it before the object of the search was completely accomplished, he must be deemed to have participated in it.

338 U.S. at 79. Officer Huffman surely had "a share in the total enterprise" that led to his viewing, and his identification as evidence, of the alleged contraband. The decision of the lower court contradicts that of this Court in *Lustig*.

II.

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF SOME UNITED STATES COURTS OF APPEAL ON THE SAME QUESTION.

A. The decision of the court below conflicts with that of the United States Court of Appeals, Seventh Circuit, reported at *United States v. Newton*, 510 F.2d 1149 (7th Cir. 1975).

The Court of Appeals, in *United States v. Newton*, reversed a trial-court denial of a motion to suppress evidence that was seized in an airport/luggage search. The Defendant Newton, like the Petitioner in the instant case, suffered the in-flight loss of her luggage. The airline employees were suspicious of Newton, and they initially opened her suitcase in the presence of govern-

ment agents. Like agent Greene in *Lustig*, the agent in *Newton*, upon having the suitcase opened in his presence, determined that it contained contraband. The court concluded:

> There was not a "hands-off" participation by the federal agents.
>
> In the first place, the airline employees did not need to search the luggage to find out to whom it belonged. They already knew. There was only one reason why they initially notified the DEA and subsequently took the federal agents into their confidence; that was to determine whether the bag contained narcotics and, if so, to turn it over to the agents for their investigative activities. That the agents came prepared to participate in the immediate investigation is without dispute. . . . Under all of these circumstances we feel compelled to reach the conclusion that this was a government search requiring the application of the Fourth Amendment.

510 F.2d at 1153. When the airline employees in the instant case reopened the Petitioner's suitcase, they, too, already knew to whom it belonged. They probably knew that before they first lifted his sweaters, inside of the suitcase, to get their first, private look at the contraband. But the only reason for opening the Petitioner's suitcase the second and third time was to assist police officers in their investigation. Indeed, the suitcase was opened at the officers' request. Yet, the court below necessarily found the fourth amendment did not apply to the search of the Petitioner's suitcase, and in so doing it is in conflict with the decision at *United States v. Newton*, 510 F.2d 1149 (7th Cir. 1975).

B. The decision below conflicts with that of the United States Court of Appeals, Ninth Circuit, reported at *Corngold v. United States*, 367 F.2d 1 (9th Cir. 1966).

The Court of Appeals, in *Corngold v. United States*, reversed a trial-court denial of a motion to suppress evidence that was seized in an airport search. In *Corngold*, airline agents opened a package, allegedly pursuant to a right of inspection reserved in its contract of carriage. But the TWA employees opened the package in response to government requests, as did the Eastern employees in the instant case. The court held, "The fruits of a search conducted solely in aid of the enforcement of a federal statute, as this one was, are inadmissible when the search fails to meet Fourth Amendment standards." 367 F.2d at 5 (citations omitted).

The court in *Corngold* stated precisely the procedure that should have been followed in the instant case:

> We would of course agree that if a carrier, while inspecting packages for its own purposes pursuant to a provision in the contract of carriage, discovers contraband and notifies the customs agents of that fact, *and the agents then secure a warrant* on the basis of this information and conduct a search, the search is entirely proper. This is precisely the procedure which the Fourth Amendment contemplates.

367 F.2d at 6 (emphasis added). The police officers in the instant case did not comply with this "procedure which the Fourth Amendment contemplates." *Id.* Thus, the decision of the lower court conflicts with that in *Corngold v. United States.*

C. The decision below conflicts with that of the United States Court of Appeals, Sixth Circuit, reported at *Cash v. Williams*, 455 F.2d 1227 (6th Cir. 1972).

Cash v. Williams involved the search of an automobile held by a wrecker operator, Mr. Rainey, in his garage. After towing the vehicle to his garage, he began searching it for the purpose of finding evidence of ownership, that he might know whom to bill for the towing charges. In the course of that search, he found a "brownish grassy substance" which he was unable to identify. 455 F.2d at 1229. Rainey returned the substance to the automobile, and law enforcement officers were summoned.

Without obtaining a search warrant, the officers confirmed the presence of marijuana in the automobile. At the outset, the Court of Appeals first recognized, as has this Petitioner, that "a search by a private citizen not acting in concert with or at the direction of the police is not a violation of the fourth amendment's prohibition of unreasonable searches." *Id.* at 1230 (citations omitted). But the *Cash* court held that "the subsequent searches by government officers must be independently tested against constitutional criteria." *Id.*[10]

Like the Eastern employees in the instant case, Rainey did not turn over the evidence that he found to the police. He merely "tipped them off" as to its location. Thus, the court in *Cash* observed that

> Rainey is best characterized not as a citizen who has furnished the government with evidence which he has seized, but as an informer who has come upon information which he feels should be revealed to the proper law enforcement officials.

[10] *Contra, United States v. Bomengo*, 580 F.2d 173 (5th Cir. 1978), *cert. denied* 99 S.Ct. 1022 (1979); *United States v. Blanton*, 479 F.2d 327 (5th Cir. 1973).

Id. (citations omitted). The court concluded that the search by the police officers, who were acting upon Rainey's information, had to be measured against fourth amendment standards.[11] The officers in that case not having obtained a warrant, and there being no justification in the record for a warrantless search, the *Cash* court concluded that the evidence seized in that search was inadmissible and that the motion to suppress was improperly denied.

The decision of the court below squarely contradicts that of the court in *Cash v. Williams*. In the instant case, the officers did not have the evidence handed over to them "on a silver platter" by Eastern employees, but instead they were "tipped off" to the presence of a suspicious substance in the suitcase. Just as the officers in the *Cash* case failed to have a magistrate determine whether they had probable cause before they re-entered the automobile, the officers in the instant case failed to take their "tip" to a magistrate for appraisal before having the Petitioner's suitcase reopened and searched.[12]

III.

THE DECISION OF THE LOWER COURT PASSES UPON A SUBSTANTIAL AND UNSETTLED QUESTION OF FEDERAL LAW.

As has already been illustrated, the decision of the lower court conflicts with the principles of *Lustig v. United States*, 338 U.S. 74 (1949). As such, and given

[11] *Cf. Lustig v. United States*, 338 U.S. at 78-79 ("it is not a search by a federal official if evidence secured by state authorities is *turned over* to the federal authorities on a silver platter.") (emphasis added).

[12] *See also United States v. Rodriguez*, 596 F.2d 169 (6th Cir. 1979) (police called by carrier to investigate contraband not required to obtain warrant where package was still open and contraband in plain view).

the facts of this case, the lower court decision joins a line of cases emanating from the United States Court of Appeals, Fifth Circuit, that likewise conflict with the principles of *Lustig* and with the other federal appellate decisions discussed above. That line of cases not only acts to unsettle this aspect of the law of search and seizure. Its basic proposition threatens the privacy clearly intended for protection by the fourth amendment. Its continued application will undermine that necessary trust by which one must permit limited, private intrusions. This case provides the Court with an opportunity to overrule bad law.

In *United States v. Blanton,* 479 F.2d 327 (5th Cir. 1973), airline employees opened an unclaimed suitcase in order to determine its ownership. They found suspected contraband, and law enforcement officials were notified. The bag was then closed by an airline employee. When the law-enforcement officer arrived, the airline employees in *Blanton* turned the bag over to him. He thereupon opened it, observed the contraband, and arrested Blanton. As in the instant case, it was conceded that the original search by the airline employees was outside the protection of the fourth amendment. "The argument is that the federal officer made a new search under circumstances where a warrant could have been obtained." *Id.* at 328. The *Blanton* court decided that "whether the bag was left open . . . or reopened by the police" was "happenstance" and "insufficient to convert an otherwise private search into an unreasonable official search in the immediate circumstances . . . which are present . . . ." *Id.*[13] Thus, the officers' opening of the suitcase, according to *Blanton,* "did not constitute a separate or additional search" to that initially made by private persons. *Id.* The *Blanton* court insisted that the case could "be distinguished from cases where the officers participate in or are in league with the private person in making the initial search." *Id.* at 329 (citation omitted).

[13]The *Blanton* case can be distinguished, on its facts, from the instant case. In *Blanton,* "the bag was turned over to the federal officers." In the instant case, however, the officers were not examining evidence turned over to them, but were instead responding to an informant's "tip" that there was suspicious material in the Petitioner's suitcase. *Cf. United States v. McDaniel,* 574 F.2d 1224, 1227 (5th Cir. 1978) ("Since the airline voluntarily *released the briefcase to the Government,* this case is controlled by our decision in *Blanton.* The district court correctly denied the motion to suppress.") (emphasis added), *cert. denied* 99 S.Ct. 2181 (1979) ("Mr. Justice BRENNAN and Mr. Justice WHITE would grant certiorari.").

[footnote continued]

Thus, on the question of whether the officer in *Blanton* should have sought a search warrant, the fifth circuit court decided that he did not conduct "a separate search." Yet, on the controlling question of whether or not the search was governmental, the *Blanton* court would seek to distinguish its case "from cases where the officers participate." The *Blanton* court, as a rationale to uphold the search in that case, found that the government's own search was not "separate" from the first search, and, at the same time, found that the government did not participate in the first search.

The fifth circuit court's decision in *Blanton* was elevated to a principle in *United States v. Bomengo,* 580 F.2d 173 (5th Cir. 1978), *cert. denied* 99 S.Ct. 1022 (1979):

> We have long recognized that a police view subsequent to a search conducted by private citizens does not constitute a "search" within the meaning of the Fourth Amendment so long as the view is confined to the scope and product of the initial search.

Id. at 175. Thus *Bomengo* extended *Blanton* to a search of a private residence, when preceded by a landlord's initial entry.[14]

The principle enunciated by the fifth circuit in *Blanton* and *Bomengo*, a principle apparently followed by the lower court in this case, is an extremely dangerous one. First, it does not consider the right or the authority of the private person to make the initial search: Under *Blanton-Bomengo* a police officer could, without a warrant, retrace the steps of a burglar-turned-informant, without conducting a "separate" or "governmental" search subject to the fourth amendment's reasonableness requirement. But if the *Blanton-Bomengo* rule *did* turn on the propriety of the initial, private search, would inquiry then need to be made into the purpose or state of mind of the inspecting landlord or hotel clerk? Would this case need to be remanded for findings of "fact" in that regard? Even if the *Blanton-Bomengo* rule was so limited, it undermines well-established law to the effect that one who confers a right to inspect or enter an area, without conferring an equal right to the use or enjoyment of that area, does not authorize the other to consent on his behalf to a warrantless search by law

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[14] *But cf. Stoner v. California*, 376 U.S. 483, 489-90 (1964), where this Court ordered the suppression of evidence found in a hotel room by law enforcement officers admitted by a hotel clerk:

> In a closely analogous situation the Court has held that a search by police officers of a house occupied by a tenant invaded the tenant's constitutional right, even though the search was authorized by the owner of the house, who presumably had not only apparent but actual authority to enter the house for some purposes, such as to "view waste." Chapman v. United States, 365 U.S. 610, 81 S.Ct. 776, 5 L.Ed.2d 828. The Court pointed out that the officers' purpose in entering was not to view waste but to search for distilling equipment, and concluded that to uphold such a search without a warrant would leave tenants' homes secure only in the discretion of their landlords.

enforcement authorities. Before "consenting" to a government search, the third person would only need to intrude before the police: The police could then follow and repeat the intrusion without probable cause, without exigent circumstances, and without a search warrant. The *Blanton-Bomengo* doctrine, in effect, allows police searches at the unfettered discretion of landlords, hotel clerks, exterminators, telephone repairmen, plumbers, and anyone else who is entrusted with access, for a limited purpose, to areas that are otherwise private. Under that doctrine it is they, not the neutral magistrate acting upon their "tip," who can authorize a governmental search. And the

> constitutional protection against unreasonable searches and seizures . . . would disappear if it were left to depend upon the unfettered discretion of an employee of the hotel.

Stoner v. California, 376 U.S. 483, 490 (1964) (citations omitted). The Court has, in this case, an opportunity to reject the *Blanton-Bomengo* rationale and to put a halt to continued state reliance upon its dangerous non sequitur. The Court should take this opportunity "so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by [the fourth amendment], by imperceptible practice of courts or by well-intentioned, but mistakenly overzealous, executive officers." *Gouled v. United States*, 255 U.S. 298, 304 (1921).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Florida District Court of Appeal, First District.

Respectfully submitted,

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Counsel for Petitioner

January 23, 1980

APPENDIX

APPENDIX A

IN THE
DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

Case No. KK-409

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND DISPOSITION THEREOF IF FILED.

MIGUEL ANGEL MORA,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

Opinion filed February 23, 1979.

An Appeal from the Circuit Court for Leon County. John A. Rudd, Judge.

Murray M. Wadsworth and William H. Davis of Thompson, Wadsworth, Messer, Turner & Rhodes, for Appellant.

Robert L. Shevin, Attorney General; Charles A. Stampelos, Assistant Attorney General, for Appellee.

PER CURIAM

Upon considering the briefs, the record and oral argument, we find no reversible error.

Accordingly, the judgment appealed from is affirmed. McCORD, Chief Judge, MELVIN and BOOTH, JJ., concur.

APPENDIX B

IN THE
DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

Case No. KK-409

MIGUEL ANGEL MORA

v.

STATE OF FLORIDA

ORDER

Petition for Rehearing and Response thereto having been considered,

IT IS ORDERED that the petition is hereby denied.

By Order of the Court dated this 21st day of March, A.D. 1979. Unless otherwise ordered, the Court's mandate will issue fifteen (15) days after this date. Florida Rules of Appellate Procedure, 9.340; General Order entered April 14, 1978. Chief Judge Guyte P. McCord, Jr., Judge Woodrow M. Melvin, and Judge Anne C. Booth.

A TRUE COPY

ATTEST:

/s/ Raymond E. Rhodes
Clerk
District Court of Appeal, First District
Tallahassee, Florida

APPENDIX C

SUPREME COURT OF FLORIDA
FIRST DISTRICT

Thursday, October 25, 1979

Case No. 56,645

District Court of Appeal
KK-409

MIGUEL ANGEL MORA,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Fla. R. App. P. 9.120, and it appearing to the Court that it is without jurisdiction, it is ordered that certiorari is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

BOYD, OVERTON, SUNDBERG and ALDERMAN, JJ., Concur

ADKINS, Acting C.J., Dissents

A True Copy
TEST:

Sid J. White
Clerk Supreme Court.

By: /s/ Janie L. Bentley
Deputy Clerk

cc: Hon. Raymond E. Rhodes, Clerk
Hon. Paul F. Hartsfield, Clerk
Hon. John A. Rudd, Judge

Murray M. Wadsworth, Esquire
and William H. Davis, Esquire
of Thompson, Wadsworth,
Messer & Rhodes
Charles A. Stampelos, Esquire

APPENDIX D

IN THE
CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

Case No. 78-83

[Filed: June 2, 1978]

STATE OF FLORIDA,

v.

MIGUEL ANGEL MORA,

Defendant.

ORDER DENYING MOTION TO SUPPRESS

THIS CAUSE coming on for hearing in open court on Defendant's Motion to Suppress Tangible Evidence, and the Court having heard argument of counsel both for the defendant and for the State, and being fully advised in the premises, finds as follows:

1. The original opening of defendant's suitcase was done with his consent and acquiescence.

2. The opening was done by private citizens not acting as agents of the police.

3. The discovery of the contraband inside the defendant's suitcase was legal, and the personnel of Eastern Airlines had an obligation to report the same to law enforcement officials.

4. The law enforcement officers viewing of the contraband was also legal in that they were responding to a complaint from private citizens.

THEREFORE, it is accordingly ORDERED AND ADJUDGED that the defendant's Motion to Suppress be denied.

DONE AND ORDERED at Tallahassee, Leon County, Florida, this 2nd day of June, 1978.

/s/ John A. Rudd
Circuit Judge